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SUPREME COURT, U. S.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1411

JOSEPH N. WILLIAMS and ROBERT L. BOSTICK,
Petitioners

v.

L. QUINCY MUMFORD, Librarian of Congress,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners Joslyn N. Williams and Robert L. Bostick respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on February 10, 1975, and the Order denying Petitioners' Motion for Rehearing and Suggestion for a Rehearing *en banc* on April 4, 1975.

OPINIONS BELOW

Two Opinions were rendered by the Court of Appeals for the District of Columbia Circuit and both are as yet unreported. The Opinions are reprinted in the Appendix hereto. The Opinion of the District Court from which the initial appeal was taken was entered on August 20, 1973 and is reported in 6 E.P.D. § 5383.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on February 10, 1975. A timely Petition for Reconsideration En Banc was denied on April 4, 1975, and this Petition for Certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Is the denial of a class action certification under Rules 23(b)(2) and 23(b)(3) of the Federal Rules of Civil Procedure appealable as of right in a Title VII Civil Rights action alleging across-the-board discrimination and a common course of conduct applicable to all class members necessitating broad-based injunctive relief?

STATUTORY PROVISIONS INVOLVED

Rule 23(b)(2) reads:

> (b) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied and in addition:
>
> * * * * *
>
> (2) the party opposing the class has acted or refused to act on grounds generally appli-

cable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole. . . .

Rule 23(b)(3) reads:

Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

28 U.S.C. § 1291 provides:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

28 U.S.C. § 1292(a)(1) provides:

The courts of appeal shall have jurisdiction of appeals from: (1) Interlocutory orders of the district court . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court . . . .

STATEMENT OF THE CASE

Williams and Bostick are black employees of the Library of Congress. Bostick claims that from the time he began his employment with the Library in 1947 he has been subject to racial discrimination as regards his job classification and promotion. On or about April 19, 1972 Bostick filed a formal Complaint alleging discrimination with the Equal Employment Opportunity (EEO) Office of the Library of Congress. Four months later he amended his Complaint and alleged discrimination affecting all other black employees of the Library. In November 1972 the EEO Office returned the Amended Complaint, stating that the office was not equipped to handle broad inquiries into the general policies and practices of the Library.

Williams had been employed as a copyright examiner with the Library since June 1967. Soon after he began his employment with the Library he was elected president of Local 1826 of the American Federation of Government Employees, a union which represents Library employees, and president of a task force named "Black Employees of the Library of Congress." Williams was active in promoting equal employment in the Library and in aiding employees who brought discrimination actions. In June 1972 he was given notice of removal effective July 21, 1972. Williams was given said notice of removal one week before he was to address the American Library Association's convention about the racial employment policies and practices of the Library.

The removal was based on charges of material misrepresentations relating to his schooling, made on his 1967 application for the position of copyright examiner. In lieu of removal, on June 21, 1972 the Library

accepted a resignation submitted by Williams to be effective on August 11, 1972. However, shortly before the effective date of his resignation, Williams requested that his resignation be withdrawn. The Library refused. Williams thereafter filed his administrative complaint with the EEO Office, alleging that his resignation was coerced and that his removal was racially motivated.

Three days later Williams also filed in the District Court an action solely on his own behalf, alleging that his removal was the result of racial discrimination and that his resignation had been coerced. On March 20, 1973 Williams filed an Amended Complaint, adding an allegation that 180 days had passed without final administrative action on his administrative complaint.

At this point Williams' Complaint was amended to add Bostick's allegations of discrimination. Additionally, both Petitioners alleged that the Library had discriminated against all blacks currently employed by it, all blacks who had been employed at any time since 1960, and all blacks who had sought employment unsuccessfully since 1960. The Amended Complaint sought relief on behalf of the individuals themselves, and both injunctive and monetary relief for the class as a whole.

On August 20, 1973, after a hearing, the District Court denied Williams' and Bostick's request for class certification. The denial was based on two grounds: First, that Williams' and Bostick's claims were not typical of the claims of the class they sought to represent as required by Rule 23(a)(3), Federal Rules of Civil Procedure. Second, given the administrative remedies available to federal employees apart from

Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, (42 U.S.C. § 2000(e)-16) the class action was not "superior to other available methods for fair and efficient adjudication of the controversy" as required by Rule 23(b)(3), Federal Rules of Civil Procedure.

The Complaint principally sought injunctive relief on behalf of the individual Petitioners and the class as a whole, under the provisions of Rule 23(b)(2).

Petitioners alleged, and the findings of independent Hearing Examiners referred to in Petitioners' Briefs, conclusively demonstrated, that the Respondents, in implementing and applying a policy of racial discrimination in employment practices, have acted, and continue to act and have refused and continue to refuse to act on grounds applicable to the class as a whole.

The District Court's Order denied certification under Rule 23(b)(2). That denial effectively precluded and foreclosed Petitioners from obtaining any injunctive relief whatever for the class. Additionally, the District Court's Order denying certification clearly indicates that it was the opinion of the Court that under no circumstances would it certify a class of racially discriminated government employees. Further, the District Court stated that in every case involving such an aggrieved employee, discovery would be limited to information exclusively dealing with that employee, and no general discovery would be permitted in order to establish classwide or historic racially discriminatory practices or policies.

The decision of the District Court therefore determines, as a final matter, that injunctive relief is wholly unobtainable.

The request for injunctive relief made by Petitioners attempted to define and broaden the rights of the class members to receive not only monetary compensation for the wrongs done them in the past, but to assure that those wrongs would not be repeated or continued in the future.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Is in Direct Conflict with Four Other Circuits.

The Court below recognized that three other Circuits have been faced with the identical question, and all three unanimously reached the opposite conclusion of this Circuit.[1] Since then, however the Third Circuit has also reached a result on the same issue directly contrary to the decision of this Circuit.[2]

In *Brunson* v. *Board of Trustees of School District #1 of Clarendon County, South Carolina,* 311 F.2d 107 (4th Cir. 1972), *cert. denied,* 373 U.S. 933 (1962), a Negro plaintiff brought a 23(b)(3) class action and, as incidental thereto, sought classwide injunctive relief against racial discrimination in the public school system. There, the Fourth Circuit held that an Order striking the class designation was appealable as a matter of right under § 1292(a).[3]

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[1] *Price* v. *Lucky Stores, Inc.,* 501 F.2d 1177 (9th Cir. 1974); Yaffee v. Powers, 454 F.2d 1362 (1st Cir. 1972); *Brunson* v. *Board of Trustees,* 311 F.2d 107 (4th Cir. 1962).

[2] *Rodgers* v. *United States Steel Corp.,* — F.2d —, 19 Fed. Rules Serv. 2d 749, 757 (3rd Cir. 1975).

[3] Section 1292 (a)(1) provides:

> The courts of appeal shall have jurisdiction of appeals from: (1) Interlocutory orders of the district court . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be held in the Supreme Court. . . .

The Fourth Circuit stated:

> The limitation of each plaintiff to an individual action on his own account and the removal of all allegations appropriate to a class action narrowed the scope of possible injunctive relief to an order requiring the admission of a particular plaintiff to a school of his choice.
>
> In an individual action maintained by a single plaintiff for his sole benefit and without reference to anyone else, he could neither ask nor hope for more. The order, therefore, was a denial of the broad injunctive relief which the plaintiffs sought, which presumably, would have affected all schools and all grades in the School District. The order was, therefore, an appealable one under § 1292 [(a)(1)], for it was a denial of the broad injunctive relief which the plaintiffs sought.

The Court determined that since the injunctive relief initially sought by the plaintiff was effectively denied by the refusal of a class certification, only a narrower and more limited injunction could be granted if the named plaintiff successfully proceeded on his own behalf. The Court found, therefore, that the plaintiff was entitled to an appeal as of right before being required to decide whether to proceed on such an individual basis.

In this matter, the District Court's Order not only denied classwide injunctive relief, but indicated that under no circumstances would the Court uphold a class of government employees and under no circumstances would it ever grant classwide injunctive relief. Certainly, such a drastic and radical denial of equitable relief falls directly within the *Brunson, Yaffee, Price* and *Rodgers, supra,* rule.

The denial of a class certification and consequent denial of injunctive relief in this matter is therefore appealable as a matter of right.

A Petition for Certiorari is thus appropriate due to the direct conflict between Circuits on this issue.

II

The Decision of the Court Below Conflicts with the Decisions of This Court.

In *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), this Court held that where a Court Order decides an issue crucial to the further conduct of the case and collateral to the merits of the action, an appeal as of right should be granted. The Court stated that such issues are:

> . . . too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. 337 U.S. 541 at 546.

The Second Circuit applied the collateral order rule to class actions in *Eisen* v. *Carlisle and Jacquelin*, 370 F.2d 119 (1966), *cert. denied*, 386 U.S. 1035 (1967) (Eisen 1). In that case, the Second Circuit found that the denial of a class action certification was an issue separable from and collateral to the merits of the case and one which involved issues "fundamental to the further conduct of the case." See, also, *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964); *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682 (1949); and *United States* v. *General Motors Corp.*, 323 U.S. 373 (1945). On this basis, the Court permitted review of the class action denial as a matter of right.

The latest word on this issue is contained in this Court's decision in *Eisen* v. *Carlisle and Jacquelin, et al.*, 417 U.S. 156 (1974).

The Court stated that:

> . . . We know, of course, that § 1291 does not limit appellate review to "those final judgments which terminate an action . . . ," *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 545 (1949), but rather that the requirement of finality is to be given a "practical rather than a technical construction." *Id.*, at 546. The inquiry requires some evaluation of the competing considerations underlying all question of finality—"the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other." *Dickerson* v. *Petroleum Conversion Corp.*, 338 U.S. 507, 511 (1950) (footnote omitted).

The Court then found that the appeal from the class action determination in *Eisen* was controlled by the decision in *Cohen* v. *Beneficial Loan Corp., supra,* and adopted the following conclusion from *Cohen:*

> 'This decision appears to fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.' *Ibid.*

This appeal too falls within that small group of cases meeting this criterion.

It "finally determines claims or rights separable from, and collateral to, rights asserted in the action."

It also has had the practical effect of nullifying the very rights Congress intended to confer upon govern-

ment employees with the 1972 amendments to Title VII.

The issues raised by this appeal in regard to the rights of government employees under the amended provisions of Title VII are therefore "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."

III

The Decision of the Court Below Raises Serious and Crucial Legal Questions of Exceptional Importance Concerning the Availability of Injunctive Relief to Government Employees Under Title VII of the 1964 Civil Rights Act.

As the Court below noted, the "net effect of the refusal to certify a class action" in a Title VII Civil Rights Case is to preclude the possibility of classwide injunctive relief in the event Petitioners ultimately prevailed on the merits. Opinion of February 10, 1975, at p. 11.

The Order of the District Court denying class action certification was thus of exceptional importance [4] as it forever foreclosed government employees from obtaining classwide injunctive relief from racially discriminatory employment practices.

Until this decision, courts have consistently and repeatedly held that even if an individual plaintiff fails to establish his or her own right to monetary relief, the evidence may be of such a nature as to establish a

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[4] Indeed, the dissenting Judges in the Opinion denying rehearing *en banc* specifically noted that this case presented questions of such "exceptional importance." Opinion Denying Rehearing, Dissent, at p. 2, fn. 3.

pervasive policy of discrimination on behalf of a class of others similarly situated to the plaintiff, and a court is obligated to consider and grant such injunctive relief to the class despite the failure of the individual plaintiff to prove his individual claim. *Huff* v. *N. D. Cass Co.*, 6 CCH-EPD, ¶ 8800 (5th Cir. 1973), and cases cited therein.

Moreover, in a vigorous dissent in the decision of the Court of Appeals below denying reconsideration *en banc*, four justices felt that this matter should be given the Court's immediate attention, since the questions presented were of grave importance to a Congressionally protected class.

As the dissenters stated,

> "It is hardly necessary in this age to argue the worth of the class action in our ever-expanding system of jurisprudence. Over the years it has promoted the convenience of courts and parties infinitely, reduced the expense of lawsuits incalculably, and contributed immeasurably to efficient judicial administration. It has, too, made its mark on the development of the law. The reports are dotted with landmark cases which without benefit of representative litigation would never have seen the light of day.
>
> "Even more profoundly, the class action has provided access to the judicial process for those who need it most. It has been the refuge of the poor, the hope of the downtrodden, and the salvation of the many whom our social institutions all too frequently victimize, unwittingly or otherwise. Truly it is said that '[t]he class action is one of the few legal remedies the small claimant has against those who command the status quo.'
>
> "In sum, as two leading authorities have aptly observed, '[i]t now is apparent that the increasing

complexity and urbanization of modern American society has tremendously magnified the importance of the class action as a procedural device for resolving disputes affecting numerous people.' And since class-action litigation could be chilled by nonappealability of denials of certifications save in narrowly limited circumstances, it is highly important to ascertain whether the panel's decision to that effect is correct. The importance of the question is underscored by the number of decisions it has generated in other circuits, and the difficulty of the problems by the conflict of opinion which plagues them.

"I would, accordingly, grant rehearing of this case *en banc*. That is not necessarily to say that the panel reached the wrong result. It is to say, however, that in my view the matter calls for consideration and decision by the full court." Opinion of Circuit Judge Robinson, III, concurred in by Chief Judge Bazelon, and Judges Leventhal and Wright.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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